No. 80-1082

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

In a state criminal prosecution, after a hearing, a trial judge concluded beyond a reasonable doubt that prosecutorial misconduct had not in any way prejudiced the defendant. Has a federal court departed from governing legal principles and unjustifiably interfered in a state criminal prosecution when, without disagreeing with the state trial judge's finding that there was no prejudice, it nonetheless grants habeas corpus relief merely because it disapproves of the prosecutor's conduct?

TABLE OF CONTENTS

	PAGE
Question Presented	1
Table of Authorities	IV
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement	3
The State Post-Judgment Proceedings	5
The Federal Habeas Corpus Proceeding	7
The District Court Decision	7
The Second Circuit Decision	8
Reasons for Granting the Writ	10
Conclusion	16

TABLE OF AUTHORITIES

PAGE

Cases:

Banks v. United States, 204 F.2d 666 (8th Cir.), *cert. denied*, 346 U.S. 857 (1953) ..... 13n.
Brady v. Maryland, 373 U.S. 83 (1963) 13, 15

Donnelly v. DeChristoforo, 416 U.S. 637 (1974) 10, 14, 15

Francis v. Henderson, 425 U.S. 536 (1976) 14

Mikus v. United States, 433 F.2d 719 (2d Cir. 1970) ..... 8n.

People v. Genovese, 10 N.Y.2d 478, 180 N.E.2d 419, 225 N.Y.S.2d 26 (1962) ..... 13n.
People v. Phillips, 87 Misc.2d 613, 384 N.Y.S.2d 906 (1975), *aff'd*, 52 A.D.2d 758, 384 N.Y.S.2d 715 (1976), *leave to appeal denied*, 39 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976) 2, 6
People v. West, 38 A.D.2d 548, 327 N.Y.S.2d 493, *aff'd*, 32 N.Y.2d 944, 300 N.E.2d 734, 347 N.Y.S.2d 203 (1973) ..... 13n.
Phillips v. Smith, 485 F. Supp. 1365 (S.D.N.Y. 1980), *aff'd*, —— F.2d —— (2d Cir. decided September 26, 1980) 2

Remmer v. United States, 347 U.S. 227 (1954) 8n., 10, 11, 12, 14, 15

Sullivan v. Fogg, 613 F.2d 465 (2d Cir. 1980) 11

United States v. Agurs, 427 U.S. 97 (1976) 8, 10, 11, 12, 13, 15
United States v. Avila-Macias, 577 F.2d 1384 (9th Cir. 1978) ..... 13n.

PAGE

United States v. Gross, 614 F.2d 365 (3d Cir. 1980), *cert. denied*, —— U.S. ——, 100 S.Ct. 3019 (1980) 11
United States v. Johns, 615 F.2d 672 (5th Cir. 1980) 11
United States v. Moten, 564 F.2d 620 (2d Cir. 1977), *cert. denied*, 434 U.S. 959 (1977) 13n.
United States v. Wood, 299 U.S. 123 (1936) 8n.

Constitutional Provisions:

United States Constitution, Fourteenth Amendment 2

Statutes:

New York Criminal Procedure Law §270.35 13n.
28 United States Code Section 1254(1) 2
28 United States Code Section 2254(a) 3, 10, 15

Other Authorities:

The Mind and Faith of Justice Holmes (Lerner ed. 1943) 15

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court:

The New York County District Attorney on behalf of the State of New York and Harold J. Smith, Superintendent of Attica Correctional Facility, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (App. A, *infra*, la-12a) is not yet reported. The opinion of the United States District Court for the Southern District of New York (App. B, *infra*, 13a-29a) is reported at 485 F. Supp. 1365. The opinion of the state trial judge denying the motion to set aside the conviction (App. E, *infra*, 33a-57a) is reported at 87 Misc. 2d 613, 384 N.Y.S. 2d 906. The order of the Appellate Division, First Department, affirming the judgment of conviction without opinion is reported at 52 A.D.2d 758, 384 N.Y.S.2d 715 (1976). Finally, the order of Chief Judge Breitel denying leave to appeal to the New York Court of Appeals is reported at 39 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1980 (App. F, *infra*, 58a-59a). Rehearing was denied on December 8, 1980 (App. G, *infra*, 60a-61a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law;

28 U.S.C. 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Statement

On Christmas Eve 1968, on New York's fashionable upper east side, in an apartment used as a house of prostitution, a pimp named Jimmy Smith and Sharon Stango, a prostitute, were shot in the head at point blank range and killed and a customer, Charles Gonzalez, was shot and left to die by a then unknown gunman with no apparent motive. After the shooting, the gunman calmly rang for the elevator, rode down to the lobby, thanked a handyman for opening the door for him and walked off into the night.

Gonzalez survived the shooting but, along with the doorman and handyman, could provide the police with only a composite sketch of the killer and a general description of the clothes he wore. In addition, one of Smith's other employees suggested that the killer might have been a police officer.

The investigation proved fruitless until 1971. In that year, the highly publicized Knapp Commission, which was appointed in 1970 by Mayor Lindsay to investigate police corruption in New York City, held a series of televised hearings. One of the star witnesses was police officer Wil-

liam Phillips, who agreed to cooperate after having been caught shaking down a notorious prostitute by commission investigators.

During his televised testimony, Phillips was seen by a detective, assigned to investigate the Smith-Stango murders, who believed that Phillips fit the composite sketch of the killer. A subsequent investigation showed that Phillips had been "shaking down" Smith for years, but in late 1968 Smith had refused to make further payments. The day before the murders, according to a woman who worked for Smith, a man whom she identified as Phillips threatened to "blow Smith's . . . head off" if Smith did not pay $1,000 the following day. In addition, the surviving victim as well as the handyman identified Phillips as the killer.

Phillips was indicted and brought to trial. All of the evidence specified above was introduced. Phillips testified in his own behalf, denied committing the murders and had an alibi supported by several witnesses. The jury reported itself deadlocked (10-2 for acquittal) and a mistrial was declared.

Between the first and second trials, there came to light evidence which destroyed Phillips' alibi as well as evidence showing that he, despite his denial, had possessed a sweater identical in color to that worn by the killer. The second trial resulted in conviction for both murders and the attempted murder and Phillips was subsequently sentenced to a term of from twenty-five years to life imprisonment.

The State Post-Judgment Proceedings

About two weeks after conviction, Richard Kuh, the District Attorney of New York County, learned that during trial the trial prosecutor knew but did not disclose that a juror had applied by letter for a job with the prosecutor's office. Mr. Kuh immediately informed both the trial judge and defense counsel about the letter. An extensive hearing was held, at which both the juror and the trial prosecutor were fully cross-examined.

Juror John Dana Smith, a Vietnam veteran who was about to graduate from Columbia University, had been accepted by the defense even though he had said that he was actively seeking employment as a federal law enforcement officer and had had dealings with the New York County District Attorney's Office when he worked as a store detective. During trial, upon learning that the District Attorney's Office was hiring investigators, Smith sent a letter applying for a position without mentioning his juror status. He believed that the application had nothing to do with his duty as a juror and that the trial prosecutor would have no reason to know about the application. At the hearing, he stated unequivocally that the application had no effect whatsoever on his deliberations or verdict. Smith did not hear from the prosecutor's office until after trial because the trial prosecutor, having been informed of the application, directed that no one have any contact with the juror until the trial's conclusion.

Also on the jury was a man named Bethel who, the trial prosecutor discovered during trial, was a defendant in a

pending misdemeanor drug possession case and who had agreed to testify against the seller of drugs in exchange for dismissal of his case. The prosecutor informed the court and defense counsel about Bethel, and he was excused and replaced by an alternate.

Even though there were other alternates available, however, the trial prosecutor believed that juror Smith had revealed fully on voir dire his desire to be a law enforcement officer. The trial prosecutor did not inform the court or defense counsel of Smith's application for a job because it was consistent with his disclosure on voir dire and because no one from the prosecutor's office had contacted the juror.

The trial judge found that Smith had been incredibly naive in sending the letter. Still, the judge credited Smith's "faith in his own integrity, in his own ability to render a verdict on the evidence, which permitted him to send his letter of application to the District Attorney and ignore the possible construction which might be placed on such action" (App. E, *infra*, 43a-44a). In addition, the court found that the prosecutor had made a "serious error in judgment" by failing to disclose the letter. Nonetheless, in a lengthy and carefully reasoned opinion, following both state and federal cases, the judge denied the motion to set aside the verdict, concluding beyond a reasonable doubt that the juror had been impartial (*id.* at 57a). The conviction was affirmed on appeal (52 A.D.2d 758, 384 N.Y.S.2d 715 [1976]), and Chief Judge Breitel denied leave to appeal to the Court of Appeals (39 N.Y.2d 949, 386 N.Y.S.2d 1039 [1976]).

The Federal Habeas Corpus Proceeding

The District Court Decision

On April 5, 1979, Phillips sought habeas corpus review in the United States District Court for the Southern District of New York. The thrust of the petition was that the State had used allegedly immunized testimony at trial in violation of Phillips' privilege against self-incrimination. On May 25, 1979, Phillips filed what he called a "supplemental petition" "to raise every possible federal issue." In this petition, after merely stating the facts adduced at the post-trial hearing, Phillips alleged in conclusory fashion that he was denied due process of law by juror Smith's participation on the jury.

Judge Lawrence Pierce did not reach the claim based on the alleged immunized testimony. Judge Pierce concluded that the record supported fully the trial court's finding that Smith's judgment was not influenced by his application and that Smith was therefore not actually biased. Judge Pierce noted that petitioner had ample opportunity to adduce evidence of actual bias, and that the trial judge, who concluded that there was no actual bias, had observed the demeanor of all the witnesses, including juror Smith, who testified at the post-verdict hearing (App. B, *infra*, 25a).

Despite the fully supported conclusion that Smith was in fact an unbiased juror, Judge Pierce believed it necessary to determine whether Smith was "impliedly biased." Judge Pierce then found that there was a "conclusive presumption" of bias (*id.* at 26a) because "it is reasonable to

ported to the judge during trial, there was a substantial likelihood that the judge would have excused the juror. On the other hand, at a post-verdict hearing, it was not likely that the judge would set aside the verdict because of the juror's application (*id.* at 7a, 10a). Thus, according to the majority, Phillips was prejudiced by the prosecutor's failure to disclose, notwithstanding the fully supported conclusion that the juror was actually impartial (*id.* at 10a).

In dissent, Judge Van Graafeiland agreed that the trial prosecutor had been wrong in not disclosing the juror's application but concluded that this failure had not prejudiced Phillips because the juror was found to have been actually impartial. Judge Van Graafeiland made the point, undisputed by the majority, that the state post-trial hearing into the juror's impartiality was precisely the procedure required by this Court as well as the Second Circuit (*id.* at 11a). Given the majority's assumption that the state hearing record could support the trial judge's finding of impartiality, it was clear that habeas corpus was granted solely because of prosecutorial misconduct regardless of prejudice, of which there was none (*id.* at 12a). Consequently, since there was no prejudice, Judge Van Graafeiland believed that rather than interpreting the Constitution, the majority was exercising supervisory powers over the administration of justice in the state courts, thereby usurping the power of the state judiciary (*id.* at 12a).

On October 10, 1980, the State sought rehearing and rehearing *en banc*, which the Court of Appeals denied on December 8, 1980. On December 12, 1980, the Second Circuit granted a motion for a stay of the mandate provided

a petition for certiorari was filed within twenty days. This Petition will have been filed on December 31, 1980 or January 1, 1981.*

Reasons for Granting the Writ

The decision in this case expands federal habeas corpus review of state convictions to permit federal courts to exercise supervisory power over the conduct of state prosecutors by nullifying convictions even though the challenged conduct did not affect the outcome of the trial. Such an expansion poses a serious threat to federal-state comity and has so far departed from accepted constitutional principles and statutory requirements as to call for review by this Court. The decision is a gross departure from these principles because it directly conflicts with no fewer than three decisions of this Court—*Remmer* v. *United States*, 347 U.S. 227 (1954), *United States* v. *Agurs*, 427 U.S. 97 (1976) and *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974)—and directly contravenes the statutory requirements governing habeas corpus. 28 U.S.C. 2254.

In the *Remmer* case (*supra*) this Court recognized that a post-verdict hearing on a juror's bias is the appropriate remedy when a juror has allegedly been influenced or en-

* Phillips has remained in custody throughout the federal proceedings. After the district court granted habeas corpus relief, he unsuccessfully sought bail from state court, as well as the district court, the Circuit Court of Appeals and Mr. Justice Marshall. After the Circuit Court affirmed the judgment granting habeas corpus, a state Supreme Court justice granted bail. However, the Appellate Division of the New York State Supreme Court prohibited petitioner's release because the grant of habeas corpus did not become effective until issuance of the mandate; thus, there were still valid state convictions for murder and state law prohibited bail for persons so convicted. Subsequently, the Second Circuit denied motions for bail or immediate issuance of the mandate and then stayed the mandate pending an application for certiorari.

gaged in misconduct during trial. In that case the Court ordered a post-trial hearing into the impartiality of a juror after the prosecutor informed the trial judge, but the judge failed to inform the defense, about a purported attempt to influence the juror and a follow-up FBI investigation which included an interview of the juror. Indeed, there is an entire body of federal law recognizing the appropriateness of post-verdict inquiry in cases involving juror misconduct during trial. *See, e.g., United States* v. *Johns,* 615 F.2d 672, 676 (5th Cir. 1980); *United States* v. *Gross,* 614 F.2d 365, 368 (3d Cir. 1980), *cert denied,*——U.S. ——, 100 S.Ct. 3019 (1980); *Sullivan* v. *Fogg,* 613 F.2d 465, 467 (2d Cir. 1980). In the instant case the state court held the post-trial hearing required by *Remmer* and concluded beyond a reasonable doubt that the juror was impartial.

True, in *Remmer,* the failure to hold a hearing at trial on whether the juror had been influenced resulted from a judicial error, and in the other cases the failure occurred because of a juror's conduct which was not discovered until after trial. Here the failure to hold a hearing resulted from a prosecutor's serious error in judgment. Nonetheless, if a post-trial hearing is the constitutional remedy for the failure to hold a mid-trial hearing because of an error by a judge or juror, there is no reason why a post-trial hearing should not be the appropriate constitutional remedy when the fault for not having a hearing at trial lies with the prosecutor. To overcome this inescapable conclusion, the court below not only ignored *Remmer,* but also misapplied *United States* v. *Agurs, supra,* which requires a showing of prejudice before prosecutorial misconduct mandates a new trial.

The *Agurs* case defined the duty of a prosecutor to disclose evidence that would likely affect the jury. A defend-

ant has a constitutional right to have exculpatory evidence considered by a jury and thus by definition, the duty to disclose material evidence defined the remedy for its breach. Once the jury had been discharged, only a new trial, before a new jury, could cure the prejudice of a verdict which might have been obtained as the result of the prosecutor's failure to disclose material evidence.

The court below used *Agurs* to define the constitutional duty to disclose information which would have had a "fair likelihood" of affecting a judge's determination concerning a juror's impartiality (App. A, *infra*, at 10a). Having so used *Agurs*, the court below found it simple to conclude, as in *Agurs*, that here only a new trial could remedy the prejudice, if any, suffered as the result of the prosecutor's breach of duty. This simple conclusion was erroneous. Factual questions involving guilt or innocence require resolution by a jury after a new trial. On the other hand, determinations by a judge, such as a finding respecting a juror's impartiality, can be made at a post-trial hearing without an entire new trial. Thus, a defendant suffers no prejudice if the only result of a prosecutor's failure to disclose is that the hearing regarding possible juror bias is postponed until after trial. As noted by the dissent below, this is the principle enunciated by the *Remmer* line of cases, a principle unfortunately ignored by the majority.

The *Remmer* line of cases stands for the additional principle that only when there is a finding that a juror was not impartial is a new trial required. Here, the state judge concluded beyond a reasonable doubt that the juror in question was impartial, a conclusion which the district court found fully supported by the record and which the court below never disputed.

Given the finding of impartiality, the prosecutor's failure to disclose did not prejudice Phillips; because the juror was impartial, Phillips has been convicted by twelve impartial jurors. The Constitution requires no more. As Judge Van Graafeiland in the dissent below correctly concluded, in the absence of a biased juror, whose participation would have rendered the trial unfair, the Constitution does not require a new trial even if the prosecutor acted reprehensibly in failing to disclose the application (App. A, *infra*, 12a). This is so because, as this Court has made clear and the majority below ignored, the governing constitutional principle in cases involving failure to disclose exculpatory evidence "is not punishment of society for misdeeds of a prosecutor but avoidance of any unfair trial to the accused." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963); *accord, United States* v. *Agurs*, 427 U.S. at 110, *supra*.

The majority opinion sought to finesse the *Agurs-Brady* requirement of prejudice by concluding that there was a "fair likelihood" that if informed of the juror's application during trial, the state judge would have exercised his discretion and replaced the juror (App. A, *infra*, 10a). Nevertheless, juror Smith was impartial and no prejudice could arise from denying the judge an opportunity to replace one impartial juror with another. Perhaps even more significant, and unmentioned by the majority, is that New York judges have no greater discretion to remove a juror during trial than do their federal counterparts.* Yet, a

* *Compare N.Y. Crim. Proc. Law* §270.35 *and People* v. *Genovese*, 10 N.Y.2d 478, 482-3; 180 N.E.2d 419, 422, 225 N.Y.S.2d 26, 29-30 (1962) *and People* v. *West*, 38 A.D.2d 548, 549; 327 N.Y.S.2d 493, 495, *aff'd*, 32 N.Y.2d 944, 300 N.E.2d 734, 347 N.Y.S.2d 203 (1973), *with United States* v. *Avila-Macias*, 577 F.2d 1384, 1387 (9th Circ. 1978) *and United States* v. *Moten*, 564 F.2d 620, 629 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977) *and Banks* v. *United States*, 204 F.2d 666, 671 (8th Cir.), *cert. denied*, 346 U.S. 857 (1953).

post-trial hearing into juror misconduct is adequate to protect an accused's right to an impartial jury verdict in federal court. *See* cases cited at p. 10-11, *supra.** Surely, the majority deviated from applicable principles by its failure to treat the state post-trial hearing the same way. *Cf. Francis* v. *Henderson,* 425 U.S. 536, 541-42 (1976).

At the core of the majority's departure from accepted principles is its incorrect insistence that the crucial and only issue in this case was prosecutorial misconduct, not juror bias. From this false premise the majority seems to have concluded that even if the juror were actually impartial, the prosecutor's failure to disclose the job application by itself deprived the accused of due process (App. A, *infra,* 10a). This conclusion is difficult to understand. As shown above, the juror was in fact unbiased; thus, the conviction has not been obtained by the failure to disclose. Put simply, here there can be no constitutional violation without prejudice. The applicable statute authorizes the granting of habeas corpus only to persons in custody in violation

* Of course, inquiry into a juror's state of mind is a difficult matter, but that difficulty is present regardless whether the inquiry takes place before, during or after trial. There are many reasons why the post-trial hearing required by the *Remmer* case is as adequate as, if not more so than, a hearing during trial. In both hearings, the judge can observe the juror's reactions during trial as well as his or her demeanor during the hearing. Further, in both situations, the juror could be brought to the court without being told why, thereby preventing preparation for the particular inquiry. With respect to the post-trial hearing there are at least two other advantages. First, defense counsel, in cross-examining the juror, would not have to tread lightly in fear that, if his challenge were unsuccessful, then he would be stuck with a juror who might well hold the cross-examination against his client. Second, at trial there would be pressure to have an abbreviated hearing to get on with the trial. Post-trial, there is no such concern. Indeed, here counsel was given wide latitude to explore as he saw fit.

of the Constitution. 28 U.S.C. 2254. Accordingly, Phillips was not entitled to habeas corpus relief.

Of course, a court having supervisory powers over the conduct of a prosecutor may desire to encourage future disclosure by punishing the prosecutor and ordering a new trial even though an accused would not otherwise have been entitled to one. Given the departure of the court below from accepted principles, the ineluctable conclusion is that this prophylactic device remains the only basis for the majority opinion. Indeed, Phillips expressly requested in his brief to the court below that it exercise such supervisory power (Brief for Appellee: 31). In accepting this invitation, the majority below, however, has brought itself into direct conflict with the applicable statute (28 U.S.C. 2254). Under that statute, habeas corpus review of a state court conviction based on prosecutorial misconduct is a "narrow one of due process, and not the broad exercise of supervisory power that [we] would possess in regard to [our] own trial court." *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642, (1974).

In exercising this supervisory power despite recognizing that there was here no actual prejudice as required by the governing constitutional principles, the majority sought final refuge in a reference to the "appearance of justice" (App. A, *infra* 10a). But as Justice Holmes knew, "if a man begins to talk about [justice] for one reason or another he is shirking thinking in legal terms." The Mind and Faith of Justice Holmes, p. 435 (Lerner ed. 1943). The majority below, in talking in this way, surely did shirk thinking in legal terms and reached a decision by exercising supervisory powers in conflict with the governing statute

and with accepted legal principles established by the *Agurs*, *Brady*, *DeChristoforo* and *Remmer* cases.

We recognize that certiorari is rarely granted and the record here shows that the trial prosecutor was clearly wrong. But that wrongful conduct did not prejudice Phillips and it makes poor sense and worse law to punish the people of New York State by requiring a new trial twelve years after the crime (with all of the attendant problems) for a corrupt police officer who was convicted of two murders on overwhelming proof of guilt by twelve jurors, not one of whom has been found to be anything but impartial. By seeking certiorari, we seek no vindication for the trial prosecutor. Rather, we seek vindication of the accepted legal principles from which the court below so clearly departed, thereby unjustifiably interfering in a most significant state criminal prosecution.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 31, 1980

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1303—September Term, 1979

(Argued June 16, 1980 Decided September 26, 1980)

Docket No. 80-2099

WILLIAM R. PHILLIPS,

Petitioner-Appellee,

against

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent-Appellant.

Before:

OAKES, VAN GRAAFEILAND, *Circuit Judges,*
and NICKERSON, *District Judge**

Appeal from a judgment of the United States District Court for the Southern District of New York, Lawrence

* United States District Judge for the Eastern District of New York, sitting by designation.

W. Pierce, Judge, granting petition for writ of habeas corpus, 485 F. Supp. 1365.

Affirmed.

ROBERT M. MORGENTHAU, District Attorney, New York County (Robert M. Pitler, Jerrold Tannenbaum, Assistant District Attorneys, of counsel) New York, New York, *for respondent-appellant*

WILLIAM M. KUNSTLER, Esq., New York, New York, *for petitioner-appellee*

NICKERSON, *District Judge:*

This is an appeal from a judgment entered on the order of the District Court, Lawrence W. Pierce, Judge, granting petitioner William R. Phillips a writ of habeas corpus unless he is retried.

Phillips, a former New York City police officer, was indicted by a New York County grand jury on March 29, 1972 for the 1968 murders of a pimp and a prostitute and for the attempted murder of a customer of the bordello where the crimes occurred. In August 1972 Phillips' first trial ended in a hung jury, deadlocked, he claims, ten to two for acquittal. On November 21, 1974, after a second trial of some seven weeks, he was convicted on all three counts. The convictions were affirmed without opinion, *People v. Phillips,* 52 App. Div.2d 758, 384 N.Y.S.2d 715 (1st Dept. 1976), and leave to appeal was denied. 29 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

In April 1979 he commenced this habeas corpus proceeding, pursuant to 28 U.S.C. § 2254, asserting, among other things, that he had been denied due process because during the second trial one of the jurors, John Dana Smith, applied

to the New York District Attorney's Office for a job as an investigator, a fact which the prosecutors knew but did not reveal to the trial judge or to Phillips' counsel. Judge Pierce conditionally granted the writ. 485 F. Supp. 1365.

Phillips' second trial commenced before New York State Supreme Court Justice Harold Birns on September 16, 1974. After ten days of voir dire, twelve jurors and four alternate jurors were selected. Although Smith indicated on voir dire an interest in pursuing a career in law enforcement, particularly with the federal government, he was not challenged by the defense and was chosen as juror number three.

On September 23, 1974, the day he was sworn as a juror, Smith had lunch with Criminal Court Officer Rudolph Fontane, who had attended John Jay College of Criminal Justice with Smith's wife. Fontane said that he was thinking of applying for a job as a rackets investigator in the District Attorney's Office and told Smith that a federally funded position for a major felony investigator had opened in that office. Smith said he was interested in the latter position.

Fontane made inquiries on behalf of Smith and himself as to the procedure for applying for a job as an investigator. He spoke first to Michael Mulderrig, an investigator in the District Attorney's Office, who said that an application and resume should be sent directly to the District Attorney. Fontane learned the same thing from Mario Piazza, a jury warden for the New York Supreme Court, who had spoken about the matter to John Lang, an Assistant District Attorney. Fontane reported what he had learned to Smith, and on October 22, 1974, after some three weeks of testimony, Smith wrote a letter to the New York

County District Attorney's Office stating, "I understand that a federally funded investigative unit is being formed in your office to investigate major felonies. I wish to apply for a position as an investigator."

Smith gave his application to Fontane, assuming that Fontane would deliver it to a personal acquaintance in the District Attorney's Office. Instead, Fontane simply placed it in the mail, although he personally delivered his own application for the job of rackets investigator. Several days after the applications were submitted, Fontane met Smith and Piazza for lunch. Later that day or the next day, Piazza called Fontane and told him that Assistant District Attorney Joan Sudolnik was responsible for reviewing applications for employment in the Major Felony Program.

Smith's application was forwarded to the Administrative Assistant District Attorney, who, on his return from vacation on November 9, 1974, sent it to Sudolnik. Sudolnik referred the application to Lang. On November 13, 1974, Fontane met Assistant District Attorney Robert Holmes, spoke of Smith's application and mentioned, for the first time to a member of the District Attorney's staff, the fact that Smith was on the Phillips jury. Holmes promptly told this to Sudolnik, who instructed both her secretary and Lang that no one should correspond with Smith until after the trial. The next day, November 14, 1974, Sudolnik met with Jack Litman, the Assistant District Attorney prosecuting Phillips, and his assistant, Phillip LaPenta, and informed them of the situation.

Litman testified that he directed Sudolnik to make no response to the application and said that he did not wish to know about anything contained in Smith's resume. Lit-

Defense counsel moved to vacate the jury verdict. Justice Birns denied the motion after an extensive post-trial hearing. *People v. Phillips*, 87 Misc.2d 613, 384 N.Y.S. 2d 906 (1975).

Justice Birns concluded that there was "no evidence" that any member of the District Attorney's staff had a sinister or dishonest motive with respect to Smith's application, 87 Misc.2d at 619, 384 N.Y.S.2d at 910, and that sending the application, though "an indiscretion", 87 Misc.2d at 627, 384 N.Y.S.2d at 915, and "unprecedented imprudence", 87 Misc.2d at 631, 384 N.Y.S.2d at 918, did not constitute improper conduct by a juror under New York State law. In light of the voir dire revealing Smith's ambitions for a law enforcement career, Justice Birns found that the application "in no way reflected a premature conclusion as to defendant's guilt, or prejudice against the defendant, or an inability to consider the guilt or innocence of the defendant solely on the evidence." 87 Misc.2d at 627, 384 N.Y.S.2d at 915.

Justice Birns also found that, although the prosecution should have informed the court and defense counsel of the application and although their failure to do so was "a serious error in judgment," 87 Misc.2d at 628, 384 N.Y.S.2d at 916, indeed, "unique misjudgment", 87 Misc.2d at 631, 384 N.Y.S.2d 918, as to the requirements of professional ethics, this failure was not such prosecutorial misconduct as to deprive Phillips of a fair trial or to prejudice his substantial rights.

In granting the writ, Judge Pierce held that, while there was insufficient evidence to support a finding that Smith was actually partial, he was impliedly biased because the "average" juror in his position "would indeed be likely to favor the prosecution's position—at least to some extent," 485 F. Supp. at 1372, and that Phillips was therefore held

in violation of the Sixth Amendment as incorporated in the due process clause of the Fourteenth Amendment. *Duncan v. Louisiana,* 391 U.S. 145 (1968).

Judge Pierce cited, among other authorities, *Tumey v. Ohio,* 273 U.S. 510, 532 (1927), in which the Supreme Court, deciding that due process requires disqualification of a judge with a pecuniary interest in finding against a defendant, stated "[e]very procedure which would offer a possible temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Given the human propensity, often subconscious, for self-justification, as well as the "psychological impact" of requiring an individual to state before others whether he was fair and impartial, *Irvin v. Dowd,* 366 U.S. 717, 728 (1961), it is at best difficult and perhaps impossible to learn from a juror's own testimony after the verdict whether he was in fact "impartial." Indeed, following a seven week trial any determination of something as amorphous as the feelings of a juror who has applied to the prosecutor for a job may be suspect. For these reasons, perhaps the law should apply the objective, prophylactic rule adopted by Judge Pierce. But we need not decide the point, for we are persuaded that, as contended by Phillips below and in the state courts, the failure of the prosecutors to disclose their knowledge denied him due process.

The requirements of disclosure which the due process clause imposes on a prosecutor have been dealt with in an analogous context in the line of cases commencing with *Brady v. Maryland,* 373 U.S. 83 (1963). The *Brady* case held that suppression by the prosecution of evidence re-

quested by the accused violated due process where the evidence was material to guilt or punishment, irrespective of the good or bad faith of the prosecution. The Court stated: "The principle . . . is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87.

Subsequently, the opinion in *United States v. Agurs*, 427 U.S. 97 (1976), reemphasized this commitment to "fairness" for the accused. The Court pointed out that the *Brady* rule arguably applies in three distinct situations.

The first involves the knowing use of perjured testimony by the prosecution. A conviction so obtained is "fundamentally unfair", and must be set aside if there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103. *See also Giglio v. United States*, 405 U.S. 150 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959). The opinion in the *Agurs* case stated that this standard of materiality is applied "not just because prosecutorial misconduct" is involved, but more importantly because of the "corruption of the truth-seeking function of the trial process." 427 U.S. at 104.

The second situation, illustrated by the *Brady* case, is where the defense requests specific evidence. In those circumstances "if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge," and "the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106.

The third situation is where, as in the *Agurs* case, there has been no specific request, in which event the prosecution has a duty to provide the defense with exculpatory evidence only if it "creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112. Agurs had been convicted for murder of one Sewell who, just before the killing, had been carrying two knives, including the one with which Agurs killed him. Agurs' counsel moved for a new trial, asserting he had discovered that Sewell had a prior record, including two guilty pleas to carrying deadly weapons, apparently knives. The prosecutor had not been requested to disclose and had not disclosed this record to the defense.

The Supreme Court held that there was no denial of due process, approving the trial court's finding that this evidence did not create a reasonable doubt that did not otherwise exist. The evidence did not contradict the prosecution's case and was largely cumulative.

For purposes of the present case what is significant in the *Agurs* opinion is its indication that had Sewell's prior record been requested and withheld Agurs would have been denied due process. Thus the standard of due process is not whether the defendant in the court's opinion was in fact guilty. The test is whether the defendant has received "fair" treatment. By deciding that a request for specific evidence must be honored the court held that to sanction the withholding by the prosecutor of specified evidence as to which there is a substantial basis for claiming materiality would not only be unfair to the defendant but would also impugn the integrity of the judicial process itself.

We think similar considerations are applicable in this case. Here the defense had no reason to believe a juror had applied to the prosecutor for a job and therefore no reason to request such information. But an impartial jury

is basic to a fair trial. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). To condone the withholding by the prosecutor of information casting substantial doubt as to the impartiality of a juror, such as the fact that he has applied to the prosecutor for employment, would not be fair to a defendant and would ill serve to maintain public confidence in the integrity of the judicial process. As in *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979), in which the convicted defendant alleged racial discrimination in the selection of the foreman of the grand jury, the "harm is not only to the accused" but "to society as a whole" when the "appearance of justice" is destroyed.

We may assume for purposes of argument that the trial judge might find after a hearing that the juror was of so staunch a character and of such extraordinary sensitivity and righteousness that his judgment would not be affected, even subconsciously, by his interest in his future employment. But it is not the prosecutor's function to predict what the court may find. His duty must be defined in objective terms. Where the facts indicate that an average juror might be prejudiced and there thus is a fair likelihood that the trial judge will exercise his discretion to substitute an alternate or declare a mistrial, the prosecution must divulge the facts upon which the exercise of that discretion depends.

No doubt there will be cases in which the prosecution receives innocuous information regarding a juror. While the prudent prosecutor will no doubt err on the side of disclosure, we do not suggest that a new trial will be required in every case. We merely hold that the prosecutor may not keep silent when he knows that a juror has applied to become his employee.

The judgment is affirmed.

VAN GRAAFEILAND, *Circuit Judge*, (dissenting):

In affirming the judgment herein, my colleagues have done exactly what the Supreme Court has said should not be done. They have measured the constitutional obligation of due process "by the moral culpability, or the willfulness, of the prosecutor." *United States v. Agurs*, 427 U.S. 97, 110 (1976). They hold that the failure of the prosecutor to disclose his knowledge of a juror's job application denied petitioner due process regardless of whether the judgment of the juror in question was in fact affected by his interest in future employment so as to deprive petitioner of a fair trial. I cannot subscribe to this unwarranted expansion of the habeas corpus powers of the federal courts.

In *Remmer v. United States*, 347 U.S. 227 (1954), an FBI agent was sent into the jury room without the defendant's knowledge or consent to investigate a rumor concerning jury tampering. The Court recognized that sending an agent in to investigate a juror as to his conduct "is bound to impress the juror and is very apt to do so unduly." *Id.* at 229. It ordered that the trial judge be directed to hold a hearing so as to determine whether the incident was prejudicial and harmful to the defendant and if "it [was] found to have been harmful, to grant a new trial." *Id.* at 230. Since *Remmer*, this has been the generally approved procedure where there are reasonable grounds to suspect jury improprieties. *See, e.g., United States v. Johns*, 615 F.2d 672, 676 (5th Cir. 1980); *United States v. Gross*, 614 F.2d 365, 368 (3d Cir. 1980); *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980). It was the procedure followed by the state court judge in this case.

The state judge held a hearing during which the challenged juror was examined. Following the hearing, the

judge found that the juror was not prejudiced or hostile and had made no premature determination of the defendant's guilt; that instead the juror was honest and able to render a verdict on the evidence. The judge concluded that petitioner had not been deprived of a fair trial. The district court likewise found that the record did not support petitioner's claim that the letter-writing juror was partial to the prosecutor's case.

My colleagues say this makes no difference and approve the granting of a writ solely because they find the state prosecutor's conduct to have been reprehensible. However, reprehensible conduct by a state prosecutor which has not deprived the defendant of a fair trial does not warrant federal habeas corpus relief. *Fambo v. Smith,* 565 F.2d 233, 235 (2d Cir. 1977). Our right to review state court proceedings is "the narrow one of due process, and not the broad exercise of supervisory power that [we] would possess in regard to [our] own trial court." *Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974), *quoting DeChristoforo v. Donnelly,* 473 F.2d 1236, 1238 (1973).

New York State Supreme Court judges are obligated and fully qualified to supervise the trial conduct of state prosecutors. Unless a prosecutor's conduct has so prejudiced a defendant as to deprive him of a fair trial, section 2254 gives a federal judge no right to usurp the state judge's function. *Borodine v. Douzanis,* 592 F.2d 1202, 1209-12 (1st Cir. 1979). The purpose of habeas corpus "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

I dissent.

APPENDIX B

Opinion and Order of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 79 Civ. 1782.

WILLIAM R. PHILLIPS,

Petitioner,

v.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

March 13, 1980.

William M. Kunstler, New York City, for petitioner.

Robert M. Morgenthau, Dist. Atty. for New York County, by Jerrold Tannenbaum, Robert M. Pitler, Asst. Dist. Attys., New York City, for respondent.

PIERCE, District Judge.

OPINION AND ORDER

This petition for a writ of habeas corpus presents this Court with the serious question of whether a defendant charged with capital crimes in state court can receive a *fair trial* where one of the members of the jury, during the

course of the trial, sought some benefit from the prosecutor's office and where this fact became known to the prosecutor during the trial but was not communicated to defendant's counsel or to the court until after a verdict of guilty had been returned.

Petitioner William R. Phillips was convicted after a trial before a jury in State Supreme Court, New York County, on November 21, 1974, on two counts of murder and one count of attempted murder. He is presently serving concurrent sentences on those charges of up to a life term of imprisonment. He has petitioned for a writ of habeas corpus pursuant to sections 2241 and 2254 of Title 28, United States Code. In support thereof, he contends, first, that he was denied his constitutional right to a trial by an impartial jury and, therefore, to due process of law in that a member of the jury had applied for employment with the prosecutor's office during the course of the trial, which application, to the knowledge of the prosecutor, was still pending at the time the jury rendered its verdict against him. He further asserts that a second juror, while serving on the jury in this case, had agreed to testify on behalf of the prosecution in another, unrelated criminal action in exchange for immunity from prosecution for himself, petitioner not having been informed of this fact until the end of the prosecution's case against petitioner. Finally, petitioner contends that a tape recording of a conversation in which he was a participant should not have been admitted into evidence at his trial because he had previously been granted transactional immunity with respect to that conversation.

In the discussion that follows, petitioner's second and third contentions will not be addressed since this Court

finds, with respect to his first contention, that the fundamental constitutional requirements of a trial before an impartial jury and of due process of law were denied to petitioner based upon the undisputed fact that a juror filed an application for a job in the prosecutor's office after being selected to serve on the trial jury in this case, which application was still pending at the time the jury rendered its verdict. The Court notes that the prosecuting attorneys became aware of this information during the trial but did not reveal it to either the defendant or the trial court until after a verdict was rendered. The Court notes further that this issue might well have been avoided if the prosecuting attorneys had timely informed the trial judge of this matter since alternate jurors were available to replace this juror/job applicant before deliberations began.

FACTS[1]

On March 29, 1972, petitioner was indicted on charges of murder and attempted murder. Thereafter, on June 28, 1972, the first trial of petitioner on these charges was commenced in State Supreme Court, New York County. However, on August 9, 1972, the jury informed the court that it was unable to reach a verdict, and a mistrial was declared. Petitioner's second trial before a jury was commenced on September 16, 1974, before Justice Harold Birns. On November 21, 1974, the jury returned a verdict convicting

1. During the post-trial hearings before Justice Harold Birns in state court on petitioner's motion to vacate the verdict of the jury on the grounds of jury and prosecutorial misconduct, the testimony of all of the persons involved in the incidents set forth in the petition before this Court was taken. Inasmuch as the parties are in substantial agreement regarding the events in controversy, a separate hearing was not held by this Court on the present petition. The events described herein have been established from the record of the criminal proceedings against the petitioner in state court, including post-trial hearings.

petitioner of two counts of murder and one count of attempted murder. Both trials were prosecuted by the New York County District Attorney's Office.

During the course of the second jury trial, one of the jurors, John Dana Smith, was informed by one Rudy Fontaine of possible employment opportunities in the Major Felony Program of the New York County District Attorney's Office. At that time, Fontaine was a uniformed court officer of the same state court in which petitioner was on trial, but was not involved in the ongoing proceedings against the petitioner. Fontaine knew that Smith had an interest in law enforcement; he also knew that Smith was a juror in the Phillips trial. During the jury selection process Smith had revealed that he was interested in law enforcement and had applied for a position with the federal Drug Enforcement Administration.

With Smith's consent, Fontaine began to inquire about employment opportunities with the New York County District Attorney's Office on Smith's behalf, as well as his own. He spoke to Michael Mulderrig, an investigator in the District Attorney's Office whom he knew, about applying for a position. Fontaine was told that he should apply for a position by submitting a letter and a resume to the District Attorney's Office by hand or by mail. The record of this matter, including the post-trial hearings held by Justice Birns at which the testimony of these persons was taken, is inconclusive as to whether Fontaine mentioned to Mulderrig either Smith's name or the fact that Smith was a juror in a pending criminal action.

Fontaine also spoke to a jury warden for the New York State Supreme Court, one Mario Piazza, to inquire if he knew where an employment application should be submitted. Piazza in turn spoke to an assistant district attor-

ney, one John Lang, and was told that employment applications should be sent to the District Attorney's Office. Piazza did not know the names of the prospective applicants at that time and did not, therefore, mention Smith's name. However, he later met Smith, while petitioner's trial was underway, at a lunch with Fontaine.

On or about October 22, 1974, Smith drafted a letter and resume pursuant to Fontaine's instructions.[2] He gave these to Fontaine in an unstamped envelope for delivery to the District Attorney's Office. Smith stated at the post-trial hearings before Justice Birns that he assumed that Fontaine had a personal contact in the District Attorney's Office and that Fontaine would personally hand-deliver the envelope to that person when Fontaine submitted his own application. (Hearing Transcript at pp. 71-72). He further stated that he did not expect that Fontaine would influence the evaluation of his application through any of Fontaine's contacts within the District Attorney's Office. He did later, however, seek the help of a former job supervisor, Wallace Reilly, *infra*, whose acquaintance with members of the District Attorney's Office, Smith hoped, would be beneficial. (Hearing Transcript at p. 73).

Fontaine thereafter personally delivered his own application to the District Attorney's Office. However, when he offered the envelope containing Smith's application, he was told that it should be addressed and mailed to Richard

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2. The letter itself did not indicate that Smith was a member of the Phillips' jury. It was addressed to District Attorney Richard Kuh, and dated October 23, 1974. It stated:

> "I understand that a Federal Funded investigation unit is being formed in your office to investigate major felonies. I wish to apply for a position as an investigator.
> Attached is my resume. Letters of recommendation will be furnished upon request. Thank you for your consideration."

Kuh, the District Attorney. Fontaine subsequently stamped and mailed the envelope as directed.[3]

Several days later, Fontaine met with Smith and Piazza for lunch, at which time Piazza informed Fontaine about Smith's application having been submitted. That afternoon or the next day, Piazza called Fontaine and told him that an Assistant District Attorney by the name of Sudolnik was responsible for reviewing applications for employment in the Major Felony Program for which Smith had submitted an application and that Smith should call her. Fontaine apparently relayed this information to Smith. It appears that, at the time of his last telephone conversation with Fontaine, Piazza was not aware that Smith was a juror in an ongoing criminal proceeding in state court.

In late October or early November, 1974, after Smith's employment application had been submitted, Assistant District Attorney Holmes was approached by Fontaine and informed that a person serving as a juror in the Phillips case had applied for a position with the District Attorney's Office. He may also have been asked if he would do something about the application, to which request, Holmes contended at the post-trial hearings, he initially indicated that he would check and see if an application had been filed. However, Holmes further contended, when he realized that the applicant was a juror, he became alarmed and told Fontaine that he would not contact Smith and that the application would not be processed. Fontaine contends that Holmes stated that he did not think that it was improper for a juror to apply for a position with the District Attor-

3. The letter with resume was received by the District Attorney's Office on or about October 23, 1974 and was routinely referred to Assistant District Attorney Conboy. It was eventually submitted to Assistant District Attorney Sudolnik.

fense counsel or the trial court should be informed. The trial, at that time, had not yet concluded. They reasoned that since Smith had indicated during the voir dire that he was interested in a career in law enforcement as an investigator and had a pending application with the federal Drug Enforcement Administration, this incident was not surprising or unexpected. Therefore, they assumed, so long as they did not contact the juror and did not gain any knowledge about his background which was unknown to the defense, they were not obligated to bring this matter to the attention of the Court or defense counsel.

On November 20, 1974, the jury retired to deliberate. At that time, three alternates were available and could have been used as substitute jurors for Smith. (Trial Transcript at p. 6156). The next day, on November 21, 1974, the jury rendered its verdict convicting the petitioner. Neither the court nor defense counsel was yet aware that Smith had applied for employment with the District Attorney's Office or that various contacts had been made with members of that office by persons interested in promoting Smith's application.

At the time the jury rendered its verdict, Smith's employment application was still pending. He had not been invited to an interview nor had he been informed of the status of his application. Having been previously informed by Piazza through Fontaine that he should contact Assistant District Attorney Sudolnik about his application, Smith attempted to contact her by telephone the day after the jury's verdict was rendered. She was not available at the time he called, however, and did not return his call. He then called his former supervisor, Wallace Reilly, under whom he had worked in the past while employed as a guard at a department store. Reilly apparently knew several of

the assistant district attorneys, and Smith asked him to inquire on his behalf. Reilly called Sudolnik and told her that Smith had worked for him and had done a good job. The fact that Smith had been a juror in the Phillips' case was also mentioned. She replied that Smith would be interviewed as would a number of other applicants and that the final selection was to be made by the New York City Bureau of Personnel and not the District Attorney's Office.

On December 9, 1974, District Attorney Richard Kuh informed the court that Smith had applied for employment during the pendency of the trial and that the two assistants had been approached regarding the application. Petitioner's defense counsel moved to vacate the verdict of the jury on the grounds of jury misconduct and prosecutorial misconduct. Justice Birns then held post-trial hearings at which the testimony of numerous persons, including Smith, was taken to establish a record of the events which occurred. Smith testified that while serving as a juror he did not consider whether the verdict would affect his application either favorably or unfavorably and that he did not think that it was improper to apply for employment when he did or that it was necessary to inform the court of his application.

Upon conclusion of the hearings, Justice Birns held that petitioner had not been deprived of his right to a trial before an impartial jury or otherwise prejudiced. Petitioner was then sentenced. On appeal, petitioner's conviction was affirmed without opinion. *People v. Phillips*, 52 App. Div.2d 758, 384 N.Y.S.2d 715 (1st Dep't). Thereafter, the New York State Court of Appeals denied leave to appeal. *People v. Phillips*, 39 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

Having exhausted all available state remedies, petitioner commenced this action for a writ of habeas corpus on April 5, 1979. *Johnson v. Metz,* 609 F.2d 1052 (2d Cir. 1979).

DISCUSSION

The Sixth Amendment to the U. S. Constitution provides that a defendant in a criminal prosecution has a right to a trial by an impartial jury. This federal constitutional right is binding not only upon the federal courts, but also upon the individual states through the due process clause of the Fourteenth Amendment. *Duncan v. State of Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

The determinative issue here is petitioner's claim that he was denied his constitutional right to a trial before a panel of impartial jurors. The gravamen of his claim is the prejudice he contends he suffered as a result of a juror having applied for employment with the prosecuting attorney's office during the course of his trial, which application was still pending during the period of the jury's deliberations. The problems caused by this event were further exacerbated by the failure of the prosecuting attorneys to promptly notify the court and defense counsel of these circumstances before the conclusion of trial and before the jury began its deliberations. Indeed, this Sixth Amendment constitutional challenge of the criminal conviction might have been avoided by prompt notification to the trial court and defense counsel and timely substitutional of one of the three available alternate jurors for Juror Smith before the jury commenced its deliberations.

Test of Jury Bias

The issue of jury bias in a criminal trial involves mixed questions of law and fact, *Reynolds v. United States,* 98

U.S. 145, 156, 25 L.Ed. 244 (1878), for which there is no single determinative test. As stated in *United States v. Wood*, 299 U.S. 123, 146, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936):

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

In reviewing such claims, the federal courts have distinguished between those actions which involve claims of actual jury bias and those involving implied bias. Actual bias may be said to exist where there is sufficient evidence of a juror's prejudiced state of mind. *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120, 89 S.Ct. 996, 22 L.Ed.2d 124 (1969). Upon a showing by a defendant that a claim of actual bias is more than mere conjecture, the court will review the trial record for objective evidence of prejudice—or the lack thereof—such as explicit assertions of partiality or of impartiality by the suspected juror to determine the validity of such claim. *E. g., Mikus v. United States*, 433 F.2d 719 (2d Cir. 1970).

Where there is insufficient evidence of actual juror bias, the court may nevertheless find that a juror occupies a status or is a party to a relationship which, as a matter of law, raises the presumption of partiality. This presumption is conclusive and may not be defeated by affirmations of neutrality by the juror. *United States v. Haynes, supra*, 398 F.2d at 984.

The common law, see Blackstone's *Commentaries on the Law of England*, Bracton on the *Laws and Customs of England*, and *United States v. Burr*, 25 Fed.Cas.P. 49, 50

(14,692g) (C.C.Va.1807), provides the foundation for the formulation of the test for implied jury bias which is presently followed by the federal courts, the "average man" test. *Dennis v. United States,* 339 U.S. 162, 176, 70 S.Ct. 519, 527, 94 L.Ed. 734 (1950) (Black, J., dissenting); *United States v. Haynes,* 398 F.2d at 985. As set forth in *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1926):

> "[E]very procedure which would offer a possible temptation to the *average man* . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." (Emphasis supplied).

Accordingly, in adjudging a claim of *implied* jury bias this Court must determine whether an average man in the position of the juror in controversy would be prejudiced. Whereas, in reviewing a claim of *actual* jury bias, the Court must determine whether the evidence produced supports the conclusion that the juror was in fact partial.

Actual Bias

The record of the post-trial hearings in state court indicates that Juror Smith was not a passive, indifferent applicant for employment. Indeed, his active interest in the position he sought is manifest from his request that Fontaine obtain information for him about the position, from his immediate drafting of a resume and cover letter pursuant to Fontaine's instructions, from his efforts to contact Assistant District Attorney Sudolnik about the job after the trial was concluded, and from the efforts of his former supervisor, Wallace Reilly, to contact the District Attor-

ney's Office at Smith's request. Moreover, since he had applied for the position of an investigator with the Major Felony Unit of the prosecutor's office while sitting as a juror in a criminal case involving a capital offense, it appears initially that petitioner's claim of actual jury bias is not mere unfounded speculation. However, a further review of the record indicates that there is insufficient evidence to support a finding that Smith was actually partial to the State's case because of his desire to obtain employment. At the post-trial hearings before Justice Birns, Smith testified, in substance, that he was not influenced by his pending employment application and that he did not attempt to influence the other members of the jury. Although efforts were made by Piazza and Fontaine to contact members of the District Attorney's Office to urge that Smith be employed, Smith apparently was unaware of these solicitations and had not requested that such efforts be undertaken on his behalf. Further, the personal inquiries which he made himself and the efforts of Reilly which were made at his request did not occur until after the jury had rendered its verdict. Justice Birns who had observed the demeanor of all of the witnesses, including Smith who testified at the post-trial hearing concerning this issue, and who had the opportunity to observe Smith throughout the trial, concluded that Smith's judgment was not influenced by these circumstances.

Therefore, since petitioner has had ample opportunity to adduce evidence of actual prejudice, the Court finds that the record of this matter does not support petitioner's claim that Juror Smith was *actually* partial to the prosecution's case because he was seeking to obtain employment.

Implied Bias

In determining whether *implied* jury bias existed, the Court is mindful that it should not "create a set of unreasonably constricting presumptions that jurors [are impliedly biased because of] certain occupational or special relationships which might bear directly or indirectly on the circumstances of a given case. . . ." *Mikus v. United States,* 433 F.2d 719, 724 (2d Cir. 1970). For example, it is clear that mere current governmental employment of a juror, unrelated to the circumstances of a criminal prosecution, is not sufficient to raise a conclusive presumption of jury bias. *United States v. Wood,* 299 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78 (1936); *Frazier v. United States,* 335 U.S. 497, 69 S.Ct. 201, 93 L.Ed. 187 (1948). Similarly, a former government employee is not barred from serving as a juror merely because of his prior employment. *Mikus v. United States, supra,* 433 F.2d at 724.

In determining that current or former government employees are not disqualified from serving as jurors as a matter of law, the Courts have reasoned that government employees have no different interest in a criminal matter than that of "any citizen who wishes to see crime properly punished." *United States v. Wood,* 299 U.S. at 149, 57 S.Ct. at 187. Nonetheless, it has been implied that exceptional circumstances may exist which would warrant a finding of inherent prejudice based on the employment affiliation of a juror. *Id.* at 150, 57 S.Ct. at 187; *Frazier v. United States,* 335 U.S. at 510, 69 S.Ct. at 208.

The reasoning of the Court in *Frazier* and *Wood* is consistent with the average man test set forth in *United States v. Burr, supra,* and *Tumey v. Ohio, supra. See Dennis v. United States,* 339 U.S. 162, 177, 70 S.Ct. 519, 527, 941 L.Ed.

734 (1950). Under this test, the average person employed by the government would not be held to be prejudiced against a defendant in a criminal prosecution, as a matter of law, because of that employment, absent exceptional circumstances.

But prospective employment of a juror by the prosecutor's office as an investigator is not the type of circumstance addressed in *Frazier* or *Wood* and is not, in the opinion of this Court, governed by their holdings. In those cases, the jurors were current government employees whose work was not related in any significant way to the matter being tried. Here, Smith was seeking employment in a clearly definable context which was closely related to the matter being tried; he sought employment as an investigator with the Major Felony Unit in the District Attorney's Office while sitting as a juror in a homicide case then being prosecuted by that very office. Under these circumstances, it is reasonable to conclude that the average person in Smith's position would believe that the verdict of the jury would directly affect the evaluation of his job application. Moreover, it would not be unreasonable for such a juror to assume that the prosecutor's office had reviewed his application and, in the process of reviewing his background, had become aware that he was a juror in a significant criminal trial it was then prosecuting, although his employment application did not so state. The Court notes that here the District Attorney's Office was in fact aware that Smith, a juror, had applied for employment, although it learned of this for reasons other than through its investigation of job applicants. Under these circumstances, reason suggests that a person would indeed be likely to favor the prosecution's position—at least to some extent.

This Court does not find that a conclusive presumption of partiality in this instance is unreasonably constrictive. No significant class of prospective jurors is likely to be affected. Furthermore, extrajudicial communications between jurors and the office of the prosecuting attorney should not be countenanced. *See Mattox v. United States*, 146 U.S. 140, 150, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892). Nor has counsel for the respondent contended that a finding of implied juror bias would constitute an unreasonable limitation.

The established principle of implied jury bias is founded in English common law and has been adopted by American courts. As Blackstone noted, a prospective juror should not serve when it is shown:

> "that [he] is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him." 3 Colley, *Blackstone Commentaries on the Laws of England* 363.

Similarly, Bracton states that if the defendant "suspects any of the twelve jurors he may remove him for just cause . . . as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get his land, as was said above; if there is ground for suspicion all are to be removed, that the inquiry may proceed free from all doubts." 2 Thorne, *Bracton on the Laws and Customs of England* 405 (1968). Our courts have frequently affirmed this tenet. Chief Justice Marshall stated

in *United States v. Burr*, 25 Fed.Cas.P. 409, 50 (14,692g) (C.C.Va. 1807) that:

> "The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice."

Accordingly, the Court finds that Juror Smith was not qualified to sit as a juror because of implied bias and should have been removed from the panel of jurors. The assistant district attorneys who prosecuted these serious criminal charges in state court must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right. They were aware of this problem long before the jury retired to deliberate and failed to bring this matter to the attention of the trial court or defense counsel. Since three alternate jurors were available at the time, this controversy could likely have been avoided by the substitution of another juror for Smith.

For these reasons, the petition for a writ of habeas corpus is hereby conditionally granted unless retrial of the petitioner commences within ninety days of the entry of this order.

So Ordered.

APPENDIX C

Judgment of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civil 1782 (LWP)

WILLIAM R. PHILLIPS,

Petitioner,

against

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

May 7, 1980

The above named petitioner having filed a petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. Secs. 2241 & 2254 and said petition having been submitted to the Honorable Lawrence Pierce, United States District Judge, and the Court thereafter on March 14, 1980, having handed down its decision conditionally granting the said petition, it is,

ORDERED, ADJUDGED AND DECREED: That the petition be and it is hereby conditionally granted unless retrial of the

petitioner comences within ninety days of the entry of the Court's order.

Dated: New York, N.Y.
May 7, 1980

RAYMOND F. BURGHARDT,
Clerk

A TRUE COPY

RAYMOND F. BURGHARDT, Clerk

THOMAS W. AGREER,
Deputy Clerk

APPENDIX D

Order of the District Court Staying the Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 1782

WILLIAM R. PHILLIPS,

Petitioner,

v.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Respondent.

Respondent seeks an order staying this Court's conditional grant of a writ of habeas corpus. See Opinion and Order dated March 13, 1980. It appearing that respondent's appeal from the Opinion and Order of this Court dated March 13, 1980 is scheduled to be heard by the United States Court of Appeal for the Second Circuit on June 16, 1980, eleven days from the date of this Order, it is hereby ordered that the Opinion and Order dated March 13, 1980 is modified to provide that petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. §2254 is hereby conditionally granted unless retrial of the petitioner commences within sixty days of the date of the determination of respondent's appeal.

SO ORDERED.

Dated: New York, New York
March 5, 1980 (date misstated).

LAWRENCE W. PIERCE,
U. S. D. J.

cutorial misconduct as to warrant the relief sought. Thus, this court is not now confronted with a challenge to the sufficiency of the evidence against the defendant. It is concerned, however, with a tangential attack designed to upset the jury's verdict.

For the reasons stated below, the motion, in all respects, is denied. The alleged misconduct does not meet the requirements of the CPL.

Prior to the court's charge on November 20 and following summations the previous day, upon information first disclosed by the prosecutors on November 18, a hearing was held, *in camera*, concerning Juror No. 6, Mr. Lawrence Bethel. On October 4, the trial prosecutors, Messrs. Jack Litman and Philip La Penta, had obtained unverified information that Mr. Bethel had been arrested on a narcotics charge, a misdemeanor. It was not immediately known, but subsequent inquiry established, that he had been arrested on February 1, 1974, arraigned in the Criminal Court on February 2, and that he had then undertaken to cooperate with the office of the Special Narcotics Prosecutor in seeking the conviction of the alleged seller of the said narcotics. The charge against Mr. Bethel had been ACD'd, i.e., adjourned in contemplation of dismissal because of his promise of cooperation (see CPL 170.55).

Mr. Litman explained that the information concerning Mr. Bethel had not been disclosed earlier because the information had not only to be verified but it was also necessary to obtain the stenographic record of Mr. Bethel's interrogation on the *voir dire* prior to the trial to determine whether the questions put to him then in any way related to this newly acquired information, and that there was considerable delay in obtaining such stenographic minutes.

At the hearing, Mr. Allen Alpert, an assistant to the Special Narcotics Prosecutor, testified that he was an observer at the Phillips' trial on October 4, and that he believed he recognized juror Bethel as a person in whom his office had an interest. Shortly thereafter, he gave the information concerning Mr. Bethel to Mr. Litman.

Mr. Bethel, summoned from the juryroom (and thereafter not permitted to return), testified that he had not disclosed his arrest upon *voir dire* because he believed the charges against him were no longer pending and were of no consequence. In fact, it appeared that no question put to Mr. Bethel at that time required him to provide any information concerning his arrest or its surrounding circumstances (*People v. Rosen*, 251 App. Div. 584). Mr. Bethel also testified that at no time did he disclose to any of his fellow jurors the fact of his arrest or his promise to cooperate with the authorities.

A defense motion for a mistrial was denied, and thereupon Mr. Litman, the defense counsel Mr. Rothblatt, and the defendant in person expressly consented to the discharge of Mr. Bethel, although defense counsel reserved the right to make further inquiry into the matter, stating he intended to call the police officer, Douglas Brussel, who had arrested Mr. Bethel, to explore the promise of cooperation by Mr. Bethel and whether such cooperation in any way "tainted" the jury. Mr. Bethel's place in the jury box was taken by Mr. Robert F. Thompson, the alternate, whose name "was first drawn and called" (CPL 270.35, subd. 1).

Following the declaration of the jury's verdict, defense counsel specifically requested a further hearing concerning Mr. Bethel. December 9 was set for that purpose. Police Officer Brussel and Mr. Bethel were to appear on that date.

In fact, Mr. Brussel on that occasion testified that he learned in June or July from Assistant District Attorney Alpert that Mr. Bethel would cooperate against the alleged seller, but he never saw Mr. Bethel after the arraignment in Criminal Court or spoke to him since that time.

This court is satisfied beyond a reasonable doubt (*Chapman v. California*, 386 U.S. 18, discussed *infra*, p. 632) that at no time did Mr. Bethel disclose to any of his fellow jurors the fact of his arrest or of his promise of cooperation. To no degree was the jury "tainted" by Mr. Bethel. There was no misconduct by Mr. Bethel. The substitution of the alternate for Mr. Bethel consented to by the defendant, prevented any prospective prejudice to the defendant. The belated disclosure concerning Mr. Bethel can be attributed in part to the delay in obtaining his *voir dire* minutes and perhaps to trial pressures on the prosecutors. However that may be, the delay itself in supplying this information, although protracted, in no manner constituted prosecutorial misconduct, as will be seen, under the provisions of the CPL (CPL 330.30, subd. 2).

At the commencement of the proceedings on December 9, District Attorney Richard Kuh, again *in camera*, in the presence of defendant and defense counsel and others, made the following statement: On December 4, he had learned for the first time that during the trial of Mr. Phillips a letter had been received by his office on October 23 from one John Dana Smith seeking employment as an investigator. It developed that Mr. Smith was Juror No. 3 at the Phillips' trial. The letter, addressed to District Attorney Kuh's office, read as follows: "I understand that a federally funded investigative unit is being formed in your office to investigate major felonies. I wish to apply

for a position as an investigator." Attached to the letter was a résumé containing biographical information concerning Mr. Smith. District Attorney Kuh proceeded to outline the history of the letter from the time of its receipt until its disclosure in court.

Defense counsel requested and was granted an immediate hearing concerning the letter and the failure of the trial prosecutors to disclose its existence during the trial. A hearing was held in open court (CPL 330.40, subd. 2, par [f]). Decision was reserved. It is noted that the law places upon the defendant "the burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40, subd. 2, par [g]).

Facts

The testimony elicited at the hearing revealed the following unprecedented chain of events:

After being selected and sworn as a juror on September 23, Mr. Smith lunched with Criminal Court Officer Rudolph Fontaine, who had attended the John Jay College of Criminal Justice with Mr. Smith's wife. They discussed jobs in law enforcement. Mr. Fontaine told Mr. Smith of opportunities for persons with investigative backgrounds in the District Attorney's office. Mr. Smith evinced interest.

Mr. Fontaine then inquired of Investigator Mulderig of the District Attorney's Office, whom he knew, as to the procedure for filing applications for investigators' positions for himself and a friend. Mr. Johanssen, Mr. Mulderig's superior, verified the procedure. At no time did Mr. Fontaine mention Mr. Smith or his status as a juror. However, he did relate the information obtained to Mr. Smith. Mr. Smith's letter was mailed on October 22 and Mr. Fontaine submitted his own letter of application.

Mr. Smith's letter found its way to the desk of Assistant District Attorney Conboy, an administrative assistant, who, upon returning from vacation, referred it on or about November 9 to Miss Joan Sudolnik, an assistant in charge of the major felony program in the District Attorney's Office. She was seeking to employ investigators. In routine fashion she turned the letter over to her subordinate Mr. Lang, who noted on a memo that an appointment should be made with the applicant Mr. Smith. Up to that point no one in the District Attorney's Office knew or had reason to know that the applicant was a juror in a pending criminal trial. Supreme Court Officer Mario Piazza saw Mr. Smith and Mr. Fontaine at a luncheonette during the trial and voluntarily undertook to learn the name of the person in charge of hiring investigators and was told by Mr. Lang on a subsequent date that it was Miss Sudolnik. Mr. Fontaine sought to learn from Assistant District Attorney Holmes, whom he knew, the progress of Smith's letter of application and his own. In conversation he told Mr. Holmes that Mr. Smith was a juror in the Phillips case and raised the question, for the first time, whether such an application was proper. Mr. Holmes thought it sufficiently questionable to immediately inform his supervisor Mr. Lankler of the pending application and, in addition, promptly told Miss Sudolnik what he had learned. This occurred November 13.

Upon ascertaining that indeed there was an application from Mr. Smith and that Mr. Smith was a juror in the Phillips case, Miss Sudolnik immediately attempted to communicate with Mr. Litman, but could not reach him until the following day, November 14. Incredulously, Mr. Litman heard the information about Mr. Smith and also was told that no action was taken upon the application. Mr. La

Penta was present. Mr. Litman directed Miss Sudolnik to make no response at all to Mr. Smith's application, with which direction she complied. On Friday night, November 15, Mr. Holmes met Mr. La Penta in a restaurant and began to tell him of the Smith letter of application. Mr. La Penta did not want to hear any mention of it at that time and place.

When Mr. La Penta and Mr. Litman discussed this extraordinary development, they concluded that all that was required of them in the circumstances of the trial was to permit no contact to develop with this juror concerning the letter of application. That posture continued until after the jury's verdict was returned. It was developed that neither Mr. Litman nor Mr. La Penta sought advice from any superior or colleague with respect to Mr. Smith's letter. It is obvious, however, that Mr. Smith's presence on the jury was now known to many persons within and without the District Attorney's Office.

On December 4, following an unsuccessful habeas corpus proceeding initiated by defendant in the United States District Court, Southern District of New York, Mr. La Penta told Mr. John Keenan, Chief Assistant District Attorney, of Mr. Smith's letter of application. Mr. Keenan promptly investigated all the circumstances surrounding this application and made the results known to District Attorney Kuh without delay. Mr. Kuh promptly and properly disclosed the facts as he knew them concerning the letter of application and the result of Mr. Keenan's investigation to the defense and the court, as stated hereinabove.

In evaluating the testimony, this court finds that despite the probing and exhaustive examination of each and every witness at the hearing, there is no evidence which to any

degree points to a conclusion that any member of the District Attorney's staff, particularly Mr. Litman, Mr. La Penta, or any court officer, had a sinister or dishonest motive with respect to Mr. Smith's letter of application, or sought to gain thereby an unfair advantage over the defendant.

We turn, first, to the defense claim that Juror No. 3 was guilty of such improper conduct that the jury's verdict should be set aside. Specifically, it is claimed that Mr. Smith's desire to obtain employment in the District Attorney's office during the trial meant that under no circumstances would his verdict be other than guilty, because his success in obtaining such employment depended upon the return of a guilty verdict, and thus the defendant was denied his constitutional right to a fair trial.

Of course, no such conclusion is warranted from a mere reading of the letter.

Whether such a conclusion is warranted at all requires an examination of all the facts and circumstances disclosed at this hearing.

A review of the *voir dire* examination of Mr. Smith is helpful in assessing this claim. On his *voir dire* examination Mr. Smith made the following declarations: 1. that he was a store detective employed by Bloomingdale's for one year, from 1972 to 1973; 2. that his wife studied criminology at the John Jay College of Criminal Justice; 3. that he, Mr. Smith, following his expected graduation from the Columbia University School of General Studies, in October, planned to obtain employment in Federal Drug Enforcement overseas, in cooperation with local [foreign] authorities (and had already applied for such employment); 4. that he had, as store detective, made a number of arrests

and on many occasions had cooperated with the New York County District Attorney's Office; 5. that his wife had been the victim of a crime, that she had been stabbed, sustaining serious injuries, and that her assailant had been prosecuted by the New York County District Attorney's Office.

The continuing interest of the juror in law enforcement was acknowledged by defense counsel and he gave it his attention in the following questions put to Mr. Smith:

> "Q. Mr. Smith, I'm just a little curious here, I'm going to use the term that you are in a peculiar situation on this case. You've sort of been on the side of the law and law enforcement, making arrests for Bloomingdale's and now you are about to be appointed with a law enforcement agency with the Federal Government. Obviously in this case Bill Phillips is being accused and being prosecuted by the District Attorney's Office, and members of the Police Department in the City of New York, who are a central part of law enforcement—and I'm sure you are aware from your background of what you know—that Bill Phillips sits here in this case just like in every case; and our system of law says that he's presumed to be innocent. Now, do you feel that in this particular case, in spite of your experience, that the term presumption of innocence, as applies in this case, is not just theoretical, but the real meaningful law? Will you be able to keep that in mind?
>
> "A. I will do that, and Mr. Rothblatt, let me say that the reason, as I mentioned before, my ex-boss steered me to the Federal Drug Enforcement Agency for legal experience. At this time, I wouldn't be able to go to law school. In the near future, after serving with the Drug Enforcement Agency, I could go to law school. At this time, I've just had enough college atmosphere.

"Q. You want a little sabbatical?

"A. Ultimately, that is what my plans would be.

"Q. In other words, law enforcement is an intermediate step?

"A. It's all part of the same package, but it's in the legal and justice system."

It is also noted that the juror declared to the trial prosecutor that he would be "a fair and impartial juror in the case", and to Mr. Rothblatt he stated that if he had a reasonable doubt of the defendant's guilt he would have no hesitancy in returning a verdict of not guilty.

Despite his predilection for law enforcement in connection with his personal ambitions, Mr. Smith was accepted by the defense without challenge for cause. He was thereupon duly sworn as a juror in the case.

At the post-trial hearing conducted by this court, Mr. Smith testified that he learned of a job opportunity in law enforcement from an acquaintance, Criminal Court Officer Fontaine, whose acquaintance he renewed after assuming his role as a juror. He testified he never discussed the Phillips' case with Fontaine. When he learned from Mr. Fontaine the procedure in which an application could be forwarded to the District Attorney's Office, he gave his letter and résumé to Mr. Fontaine, who mailed it. He admitted that this act was imprudent, but asserted that his verdict in no way was conditioned upon the hope of employment by the District Attorney. He testified, "I am willing to take a rap for naivete." He stated to Mr. Rothblatt, "I swore on oath to listen to the evidence and to render a verdict on that evidence. I did so." Further, "To imply that I worked the jury's mind is repugnant to me and to the other jurors." To a question whether the hope of employment

would have in any way affected his verdict, he said, "That didn't enter my mind; I didn't think about it that way." Mr. Smith made no inquiry as to the progress of his letter of application until after the verdict, when for the first time he called Miss Sudolnik. She told him that she would look into the matter but never again communicated with him.

Mr. Rothblatt also inquired as to a conversation post verdict between Mr. Smith and his former supervisor at Bloomingdale's. Mr. Smith's testimony with respect to this was as follows: "A. He [Reilly] said, 'Did you really think the guy was guilty?' and I said yes, he was guilty as hell. He [Reilly] said, 'Was there a long deliberation?' I said, 'No it wasn't a very long deliberation.' That was the extent of it." Mr. Smith also discussed the progress of his application with Mr. Reilly, who had originally suggested to Mr. Smith that he seek a job with law enforcement (see *voir dire* of Juror Smith).

The defense has failed to establish that Mr. Smith's letter of application in any way reflected a prejudice, hostility, or premature determination as to the defendant's guilt (*United States v. Brown*, 79 F.2d 321). In no way did the letter reflect a state of mind on the part of this juror other than that acknowledged by the defense when it accepted the juror. As stated, Mr. Smith's predilection for law enforcement was well known to the defense and hence may not be used belatedly as a basis for challenge post-trial (*People v. Mack*, 35 App. Div. 114; *People v. Smith*, 169 N.Y.S. 837; see, also, *People v. Cosmos*, 205 N.Y. 91,103).

From all the evidence adduced, this court finds that it was Mr. Smith's faith in his own integrity, in his own ability to render a verdict on the evidence, which permitted him to send his letter of application to the District Attorney, and

ignore the possible construction which might be placed upon such action. As will be seen, the act of sending the letter did not constitute improper conduct within the meaning of CPL 330.30 (subd. 2).

We now turn to the additional defense claim that the trial prosecutors were guilty of improper conduct so as to deny the defendant a fair trial.

Specifically, it is asserted that their failure to inform defense counsel and the court of Mr. Smith's letter of application interfered with a substantial right of the defendant, i.e., a right to a fair and impartial jury and, in addition, if there had been such disclosure, the defendant then had a right under such circumstances to challenge Mr. Smith and have him removed from the jury before deliberations began (CPL 270.35, subd. 2).

As stated earlier, the letter of application was called to the attention of Mr. La Penta on November 14. The dilemma which then concerned the prosecutors was summarized in Mr. La Penta's testimony when he recalled saying to Mr. Litman, "What the hell do you do in a situation like this?"

After reflection, the prosecutors concluded that Mr. Smith's expressed desire in the letter to obtain employment in a Federally funded program in the District Attorney's Office was in no way inconsistent with the ambitions he unmistakably declared in the *voir dire*. They concluded that under these circumstances Mr. Smith had not engaged in any act of misconduct as to require them to bring knowledge of his letter to the attention of the court or defense counsel; that their prosecutorial responsibility would be met if the District Attorney's Office deliberately and assiduously avoided any further communication with Mr. Smith with respect to the letter of application.

They also reasoned that because there had been no dialogue between Juror Smith and the District Attorney's Office, as there had been between Juror Bethel and the office of the Special Narcotics Prosecutor, the absence of bilateral communication justified nondisclosure.

The Law

Juror Misconduct

CPL 330.30, as far as applicable to this case, provides: Motion to set aside verdict, grounds for.

"At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds: * * *

"2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict."

Under this section it appears that within certain time requirements (which have been met in this case) a verdict may be set aside on motion of the defendant *only* when there was improper conduct on the part of a juror which may have affected a substantial right of the defendant, or *only* when there has been improper conduct by another person in relation to a jury which may have affected a substantial right of the defendant, and such conduct was not known to the defendant prior to the jury's verdict. This section of the CPL is derived from subdivisions 2, 3, and 4 of section 465 of our former Code of Criminal Procedure

(see Denzer, Practice Commentaries, McKinney's Cons Laws of N.Y. Book 11A, p. 13).

Subdivisions 2, 3 and 4 of section 465 of our former Code of Criminal Procedure read as follows: "The court in which a trial has been had upon an issue of fact has power to grant a new trial, when a verdict has been rendered against the defendant, by which his substantial rights have been prejudiced, upon his application in the following cases * * * 2. When the jury has received any evidence out of court * * * 3. When the jury * * * have been guilty of any misconduct by which a fair and due consideration of the case has been prevented; 4. When the verdict has been decided * * * by any means other than a fair expression of opinion on the part of all the jurors."

It would appear our former Code of Criminal Procedure empowered the court to grant a new trial when the jury was "guilty of any misconduct," but only where the defendant's "substantial rights have been prejudiced" and only where such misconduct "prevented" a "fair and due consideration of the case" (*People v. Cocco*, 305 N.Y. 282, 287, dissenting opn., FULD, J.).

Upon comparison, the thrust of both sections appears to be similar; that is, upon defendant's motion a jury's verdict may be vitiated where a defendant's substantial rights have been adversely affected by juror misconduct which would prevent a fair and due consideration of the case.

To interpret properly the current provisions of the CPL which permit a jury's verdict to be set aside, it will be necessary then to consider cases which were decided in similar instances under our former Code of Criminal Procedure. But first it will prove helpful to note the observations of recognized commentators on the subject of criminal law.

It is not every act of misconduct by a jury which will

his colleagues that the defendant on trial for robbery resembled members of a family he formerly knew with a reputation for being "tough", this statement was held not to have prejudiced the defendant so as to warrant a new trial (*People v. Thompson*, 198 N.Y. 396). Where a juror read from a copy of the Penal Law and the Code of Criminal Procedure and exhibited those volumes to the jury during deliberations, and where, in another case, a jury obtained a copy of the revised statutes while deliberating on a verdict, it was held in each case that the irregularity did not vitiate the verdict unless it could be shown that the defendant was prejudiced thereby (*People v. Priori*, 164 N.Y. 459; *People v. Draper*, 28 Hun 1). "[A]n irregularity or indiscretion of a jury is not of itself sufficient to warrant a new trial. More must be shown * * * The irregularity or indiscretion must be of such a nature as prevented fair and due consideration of the case" (*People v. Catalanotte, supra*, p. 353).

On the other hand, in a case where a defendant, a foreigner, was tried for murder and testified in his own behalf, and where it was established, without dispute, that a juror stated he would not believe a person of such nationality under oath, this continuing prejudice was held to deny defendant a fair trial. The verdict of guilty was vacated as a nullity (*People v. Leonti*, 262 N.Y. 256). The fact that a juror had a racial prejudice against the accused was held to deprive the defendant of a fair trial (*People v. Whitmore*, 45 Misc. 2d 506, revd. on other grounds 27 A.D.2d 939). Where jurors made unauthorized visits to the scene of alleged crimes, such action constituted the jurors witnesses against the respective defendants, thus depriving the particular defendant of Sixth Amendment rights, i.e., the right

to be confronted by such witnesses (*People v. De Lucia,* 20 N.Y.2d 275; *People v. Crimmins,* 26 N.Y.2d 319; see, also, *Parker v. Gladden,* 385 U.S. 363). Where a juror concealed a personal bias against the defendant, the defendant's right to a fair trial by an impartial jury was adversely affected (*People v. Harding,* 44 A.D.2d 800). In recognition of the fundamental rights to which a defendant is entitled in the administration of criminal law, it has been emphasized "a defendant has a right to a trial by a fair and impartial jury" (*People v. DeLucia, supra,* p. 278).

Thus, in determining whether alleged misconduct by a juror should warrant a new trial, it must be demonstrated that the fundamental right to a fair and impartial assessment of the facts were frustrated. This is always a crucial issue where juror misconduct is asserted.

Federal Jurists have considered similar problems. A reference to two cases in the Southern District will suffice. In *United States v. Brown* (79 F.2d 321, *supra*), during the pendency of a trial, a juror obtaining a haircut was asked by his barber how the trial was going and whether the defendant would be convicted. He answered, "I think so." This indiscretion was held not to show, as claimed, "a premature conclusion by the juror" as to the defendant's guilt so as to deprive the defendant of a fair trial. "It * * * was not an expression of a separate opinion to which a juror might feel himself committed; it was merely a forecast of the verdict, which could hardly be more than a provisional guess." (See opn., LEARNED HAND, J., p. 324.)

The case of *People ex rel. Moore v. Fay* (238 F. Supp. 1005, 1007) is most instructive on the issues before this court. Following a verdict in a State court convicting the defendant Moore of manslaughter, it was disclosed that

during the trial a juror, in violation of instructions not to discuss the case with others, communicated with his own attorney as to the propriety of a question asked by counsel during the trial. Judge EDWARD WEINFELD of the United States District Court, in denying habeas corpus relief sought by the defendant, observed (p. 1007): "There can be no doubt that the juror's communication with the third party violated the Court's expressed instruction, in consequence of which the juror's name was stricken from the jury list. However, not every violation by a juror of the Court's instructions with respect to third party communications, nor every irregularity in a juror's conduct, automatically compels the declaration of a mistrial, the replacement of a juror, or the vacatur of a judgment of conviction. The dereliction must be such that it may be said to deprive the parties of the continued objective and disinterested judgment of the juror, thereby foreclosing a fundamentally fair trial. This is not a case where a third party communicates with a juror with overtones of bribery, coercion, tampering, shadowing or other conduct which carries with it a presumption of prejudice. Here, the juror, seemingly in doubt as to the prosecution's action and the Court's ruling, himself initiated the communication. In and of itself, the incident did not suggest any prejudicial attitude toward the defendants." Cases have been cited by the defendant which spell out a dialogue or bilateral communication between a juror and third parties where the respective court believed the matter to be of such moment as to set a verdict aside (*Tableporter v. Urist*, 157 Misc. 347; *Pekar v. United States*, 315 F.2d 319).

On the other hand, in a prosecution for passing a fictitious check, a casual conversation between a trial prosecutor

and a juror in a courtroom corridor, in plain view of bystanders, was held not to be such misconduct as to require the setting aside of the jury's verdict (*People v. Newell*, 192 Cal. 659).

In the case at bar no dialogue or bilateral communication between Juror Smith and representatives of the District Attorney's office has been established. The direction of Mr. Litman to Miss Sudolnik not to respond to the letter effectively encapsulated the communication. There was nothing in the letter which in any way was inconsistent with the ambitions expressed by the juror in the *voir dire*, which were acknowledged and accepted by the defense. Mr. Smith's letter was indeed an indiscretion but, in the light of his *voir dire*, in no way reflected a premature conclusion as to the defendant's guilt, or prejudice against the defendant, or an inability to consider the guilt or innocence of the defendant solely on the evidence.

Prosecutorial Misconduct

We turn now to the issue of prosecutorial misconduct as claimed by the defense. The decision not to disclose the job application of Juror Smith was made by Mr. Litman, with six trial weeks behind him and summation a week away, with knowledge of the looming problem of Juror Bethel and at a time when the defendant had just completed his fourth day of cross-examination by Mr. Litman.

Mr. Litman believed that he met his professional responsibility by ignoring Mr. Smith's letter and advising his associates in the District Attorney's Office to do the same.

The standards of the American Bar Association provide: "If counsel suspects * * * juror misconduct he should, of course, report it to the court" (American Bar Association,

Standards Relating to the Prosecution Function and the Defense Function, commentary to § 5.3, p. 116).

The standards of the New York State Bar Association provide: "Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards * * * a juror * * * should make a prompt report to the court regarding such conduct" (Code of Professional Responsibility, EC 7-32).

Mr. Litman and Mr. La Penta, in their testimony, explained that they did not view Mr. Smith's letter as "juror misconduct," and it appears that they were correct. But undoubtedly, it was questionable conduct, and, under the circumstances, this court and defense counsel should have been made aware of it during the trial, as they were made aware of it on December 9.

It was a serious error in judgment, although there may be room for a contrary opinion (*People v. Cocco*, 305 N.Y. 282, *supra*, [see dissenting opn., Fuld, J., p. 287]; see, also, *United States v. Kyle*, 469, F.2d 547). The Assistant District Attorneys were quasi-judicial officers holding a special status in the administration of criminal law. As prosecutors, they were "not [to be] the judge of what is unduly prejudicial to the government or the defense" (*United States v. Kyle, supra*, p. 552 dissenting opn. of Bazelon, Ch. J.). Certainly prosecutors are to be held to a higher standard than that required of ordinary laymen (cf. *Meinhard v Salmon*, 249 N.Y. 458). Had they not permitted the pressures of the case to becloud their professional vision, there would be no need for this hearing, the occurrence of which has proved inevitable.

Moreover, the juror could have been excused by consent, or an application for a discharge of a juror could have been

made by defense counsel (see *People ex rel. Moore v. Fay*, 238 F. Supp. 1005, *supra*). Whether at the time this court would have ruled to excuse the juror on grounds specified in our CPL (§ CPL 270.35) is now beside the point, but will be discussed hereinafter. Alternates were available to replace up to four jurors, who for one reason or another might be unable to sit until the conclusion of the trial.

However we are not now concerned with the resolution of a question of professional ethics. We are considering a definite narrow legal issue, i.e., whether the failure to disclose Mr. Smith's letter of application constituted "improper conduct by another person in relation to a juror," and if so, may it "have affected a substantial right of the defendant" (CPL 330.30, subd. 2).

From a mere reading of the statute one may readily conclude that the phrase "improper conduct by another person in relation to a juror" was designed to meet the problem of "jury tampering"; that is, affirmative action by a third person directed toward a juror with intent to affect a jury's verdict (for examples of such conduct see *People v. Cocco*, 305 N.Y. 282, *supra; People v. Sher*, 24 N.Y.2d 454).

In the *Cocco* case, a discharged alternate in a public restaurant, during the time the sequestered jury was about to dine, informed a juror that he heard the defendant on trial for a felony ran "a sporting house." Despite the juror's disclaimer that her judgment was in no way impaired as a result of this conversation, the verdict of guilty was set aside, the Court of Appeals concluding that the defendant's right to a fair trial was adversely affected.

In another case, during the taking of testimony in a trial of a defendant charged with murder, several jurors received anonymous communications by telephone disparaging the

defendant. The trial court, after determining that each recipient of a call could render a fair and impartial verdict on the evidence, refused to set aside a verdict convicting the defendant. The judgment of conviction was affirmed (*People v. Sher, supra*). It is not necessary to analyze the rationale distinguishing the contrary result in each case. The point is that in each case it was affirmative activity by a third party in relation to a juror which brought into question whether the sanction of law should be imposed.

It is claimed by the defense that the failure of the trial prosecutor to disclose Mr. Smith's letter amounted to "improper conduct by another person in relation to a juror." Such omission to disclose cannot be equated with jury tampering. The challenged behavior of the prosecutors focuses upon an omission to act in relation to a juror rather than some positive deliberate step by the prosecutors designed to influence the jury's verdict. Accordingly, this court cannot hold in this instance that there was prosecutorial misconduct within the meaning of the CPL [CPL 330.30, subd. 2].

The defense also contends that the failure to disclose Mr. Smith's letter during trial deprived it of the opportunity to challenge the juror during trial.

The CPL permits, under certain circumstances, the discharge of a juror during trial where the juror's continued presence on the jury is attacked (CPL 270.35, subd. 2). If it is shown "that a juror has engaged in misconduct of a substantial nature but not of a kind to require the declaration of a mistrial pursuant to subdivisions one and two of section 280.10, the court may," if an alternate juror is present, "discharge such * * * juror" and replace him with the appropriate alternate.

It is not *any* misconduct of a juror which may require a change in the jury's composition, but "misconduct of a substantial nature" which would not require the declaration of a mistrial under conditions specified in another section of the CPL (CPL 280.10).

Under CPL 280.10 (subd. 1), a defendant may move for a mistrial prior to the jury's deliberation only when "there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives him of a fair trial."

To warrant a mistrial on a defendant's motion, the conduct complained of must "so clearly [deprive the defendant] of a fair trial that it would require a reversal on appeal of a prospective judgment of conviction" (see Denzer, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 11A, CPL 280.10, p. 521, citing *People v. Byrne,* 17 N.Y.2d 209; *People ex rel. Costello v. La Valle,* 13 A.D.2d 601; *People v. Montlake,* 184 App. Div. 578).

While the degree of misconduct required to merely excuse a juror under attack during trial (CPL 270.35, subd. [2]) appears to be less than that which would warrant mistrial sought by a defendant (CPL 280.10, subd. 1), nevertheless to remove a juror during trial, his misconduct must be found to be substantial. It necessarily follows that such misconduct must be of such import as to affect adversely the ability of the juror to sit fairly and impartially assess the issues on trial.

The conduct of Mr. Smith in sending his letter of October 22, as shown hereinbefore, in no way deprived the defendant of a fair trial so as to warrant the declaration of a mistrial on defendant's motion under CPL 280.10. Nor did that act amount to misconduct of a substantial nature which

would, in the light of his answers during his *voir dire* examination, require him, *ipso facto*, to be excused under CPL 270.35 (subd [2]). To no degree did the letter have such import in relation to the issues at the trial so as to demonstrate Mr. Smith's hostility or prejudice to the defendant or a premature determination of the defendant's guilt (*United States ex rel. Moore v. Fay*, 238 F. Supp. 1005, *supra*; *United States v. Brown*, 79 F.2d 321, *supra*). It was, at most, an irregularity. Had the receipt of the letter been disclosed at the trial, in the absence of a consent by the District Attorney to excuse Mr. Smith as a juror, defendant's motion challenging the right of Mr. Smith to continue to sit as a juror would necessarily have to be denied as a matter of law.

Conclusion

Each such case must be considered in the light of its own facts and circumstances (*United States v. Betner*, 489 F.2d 116). "[W]hen jury misconduct is alleged in a defendant's motion for a new trial, the trial judge has a duty to take the following actions: he must conduct a full investigation to ascertain whether the alleged jury misconduct actually occurred; if it occurred, he must determine whether or not it was prejudicial; unless he concludes that it was clearly not prejudicial, he must grant the motion for a new trial; if he concludes that it did not occur or that it was clearly not prejudicial, he must spell out his findings with adequate specificity for meaningful appellate review." (*United States v. McKinney*, 429 F.2d 1019, 1026).

Only for the most compelling reasons should a jury verdict be set aside (*McDonald v. Pless*, 238 U.S. 264; *Tanner v. Stimm*, 66 Misc. 2d 1030; *People v. Maynard*, 80 Misc. 2d 279).

It would be manifestly improper to permit a tangential post-trial attack of insufficient strength to overcome the verdict in this case, which rests upon so firm a factual foundation.

More particularly, it would be manifestly improper to invalidate the verdict here merely because of unprecedented imprudence on the part of a juror or unique misjudgment of the trial prosecutors as to the requirement of professional ethics, where no prejudice to the defendant's substantial rights has been shown and substitution for such juror during trial most likely would not have altered the result (cf. *United States v. Keogh*, 391 F.2d 138, 148). As has been stated in another connection, "A defendant is entitled to a fair trial but not a perfect one" (*Lutwak v. United States*, 344 U.S. 604, 619).

Aware that the present application for a new trial under CPL 330.30, like its predecessor section 465 of the Code of Criminal Procedure, is addressed to the sound judicial discretion of the Trial Judge, this court is of the opinion, from the testimony adduced at this hearing, that the defendant's substantial rights were not prejudiced.

Although our CPL specifies that the defendant has the "burden of proving by a preponderance of the evidence every fact essential to support the motion" (CPL 330.40, subd. 2, par [g]), it is noted that the defendant's claim that he was denied his right to a fair trial is one of constitutional dimension (U.S. Const., 6th Amdt.; N.Y. Const. art. I, § 6). Accordingly, this court holds, as it is required to do under such circumstances, that it is satisfied beyond a reasonable doubt that the "irregularities" established were harmless and did not contribute to the verdict in this case (*Chapman v. California*, 386 U.S. 18, *supra*, citing *Fahy v. Connecticut*, 375 U.S. 85; *People v. Catalanotte*, 67 Misc. 2d 351, *supra*).

The defendant's motion is in all respects denied.

APPENDIX F

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of September, one thousand nine hundred and eighty.

Present:

HON. JAMES L. OAKES
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges
HON. EUGENE H. NICKERSON
District Judge

80-2099

WILLIAM R. PHILLIPS,

Petitioner-Appellee-cross-appellant

v.

HAROLD J. SMITH, Superintendent of Attica Correctional Facility,

Respondent-Appellant-cross-appellee

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the respondent-appellant.

A. Daniel Fusaro
Clerk

By: /s/ Rolanne Henry
Rolanne Henry
Deputy Clerk

APPENDIX G

Denial of Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighth day of December, one thousand nine hundred and eighty.

No. 80-2099

WILLIAM R. PHILLIPS,

Petitioner-Appellee,

v.

HAROLD J. SMITH, Superintendent of Attica Correctional Facility,

Respondent-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent-appellant, Harold J. Smith,

Upon consideration by the panel that heard the appeal, it is